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SUPREME COURT, U.S.
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 29

O. B. WILLIAMS AND LILLIE SHAVER HENDRIX,
Petitioners,

vs.

THE STATE OF NORTH CAROLINA.

BRIEF FOR PETITIONERS.

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Syllabus of Brief.

A divorce action is one *in rem*. *Garner* v. *Garner*, 56 Md. 127; *Hood* v. *Hood*, 110 Mass., 463; *Ferrell* v. *St. Paul*, 64 N. W., 809; (Minn.); *Gould* v. *Crow*, 57 Mo., 200; *Page* v. *Baker*, 75 N. Y. 78; *Ditson* v. *Ditson*, 4 R. I., 87; *Gildersleeve* v. *Gildersleeve*, 88 Conn. 689; *Miller* v. *Miller*, 200 Io., 1193; *Freet* v. *Holdorf*, 205 Io., 1081; *Kendrick* v. *Kendrick*, 188 Mass., 550; *Keenan* v. *Keenan*, 40 Nev. 35; and indeed North Carolina recognizes a divorce action to be an action *in rem* (see Appendix II), in that said State of North Carolina authorizes by the statute set forth as Appendix II the granting of divorce upon service by publication.

An action for divorce being one *in rem* service by publication is valid. *Pennoyer* v. *Neff*, 95 U. S., 714; *Gassert* v. *Strong*, 38 Mont. 18; *White* v. *Glover*, 116 N. Y. S., 1059.

North Carolina under Article IV, section I of the Constitution of the United States is obliged to give full faith and credit to a foreign divorce decree in the absence of fraud. *Faris* v. *Hope*, 298 F. 727; *Frey* v. *Frey*, 58 F. 2d 1046; *Davis* v. *Davis*, 83 Lawyers Edition, 26; *Loughran* v. *Loughran*, 292 U. S., 216; *Atherton* v. *Atherton*, 181 U. S. 155; *Kirby* v. *Kirby*, 55 P. 2d 356; *Voorhies* v. *Voorhies*, 166 So. 121; *Cope* v. *Cope*, 196 A. 422; *Cardinale* v. *Cardinale*, 68 P. 2d 351; *Miller* v. *Miller*, 200 Iowa; 1193; *Commonwealth ex rel. Cronhardt* v. *Cronhardt*, 193 A. 484; *Renner* v. *Renner*, 181 A. 191; 19 Corpus Juris, section 836, page 370.

Plaintiffs in error having been adjudged bona fide citizens of Nevada are entitled, under Article IV, Section II of the Constitution of the United States, to the privileges and immunities therein guaranteed. *Conner* v. *Elliott*, 15 Lawyers Edition, page 497; *Cole* v. *Cunningham*, 33 Federal 538.

The North Carolina Statute involved in this action, as set out in Appendix I, is unconstitutional for the reason that it is an unlawful extension of legislative power to a foreign state legislating what shall be lawful and unlawful in such foreign state. *Connolly* v. *Union Sewer Pipe Company*, 46 Lawyers Edition, 679; *Ratcliff* v. *The State of Texas*, 289 S. W. 1072.

It is the social duty as well as the legal duty of the Court to reverse the North Carolina Supreme Court because to uphold the decision of said State's Supreme Court will have far reaching social aspects in that it would disrupt many homes, bastardize many children and abrogate vested property rights based upon such marital relationships.

Statement of Jurisdiction.

This court has jurisdiction to review the opinion of the Supreme Court of North Carolina for the reason that it involves three distinct Federal questions as follows:

1. Article IV, Clause I of the Constitution of the United States is as follows: "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

The Supreme Court of North Carolina is obliged to give full faith and credit to the judicial decrees of a sister state when those judicial decrees have been entered pursuant to and in accordance with the laws of such sister state.

2. The plaintiffs in error having been adjudged bona fide citizens of the State of Nevada, and that adjudication not having been impeached for fraud, the plaintiffs in error under and by virtue of Article IV, Clause II of the Constitution of the United States were and are entitled to the same privileges and immunities in the State of North Carolina as were accorded to them in the State of Nevada under and by virtue of the decrees of divorce there rendered and the subsequent marriage entered into.

3. That under the Fourteenth Amendment to the Constitution of the United States, the plaintiffs in error having been adjudged bona fide citizens of the State of Nevada and having intermarried with each other pursuant to the laws of that State cannot be successfully prosecuted under laws of the State of North Carolina when the effect of such laws are to reach beyond the borders of the State of North Carolina and declare what is valid or invalid in sister states.

Such extension is an unconstitutional extension of legislative power which is condemned by Amendment XIV, Clause I of the Constitution of the United States.

Statement of Case.

The plaintiffs in error, O. B. Williams and Lillie Shaver Hendrix, established a bona fide residence in the State of Nevada and such residence was adjudged to be bona fide (see decree R. 17) (See decree R. 34), and upon such adjudication were duly awarded a decree of divorce from their respective spouses by a court of competent jurisdiction in the State of Nevada. Subsequent to the rendition of the decrees of divorce, the plaintiffs in error intermarried with each other in the State of Nevada and in accordance with the laws of that State. Subsequent to their intermarriage with each other the plaintiffs in error removed to the State of North Carolina and the State of North Carolina indicted the plaintiffs in error under Section 4342 of the North Carolina Code defining the crime of bigamous cohabitation (See appendix I).

Upon a verdict of guilty his Honor H. Hoyle Sink imposed sentence upon the male defendant of not less than three nor more than ten years in the State's Prison at Raleigh, North Carolina, and imposed upon the female defendant a prison sentence of not less than three nor more than five years in the State's Prison at Raleigh, North Carolina (R. 48).

Upon appeal to the Supreme Court of North Carolina the judgment of the lower court was affirmed (see opinion R. 55).

The plaintiffs in error filed a petition for writ of certiorari in this Honorable Court on February 26, 1942, which petition was granted on March 30, 1942 (R. 76).

Assignment of Errors.

The plaintiffs in error made the following assignments of error in the Superior Court of Caldwell County and in the Supreme Court of North Carolina:

Error No. 1 (R. 49)—The defendants and each of them assign as error the Court's failure to allow the defendants' motions for judgment of nonsuit at the close of the State's evidence, as follows:

At the close of the State's evidence the defendants and each of them move for judgment of nonsuit. Motion denied as to each defendant and the defendants and each of them except.

Error No. 2 (R. 50)—The defendants and each of them assign as error the refusal of the Court to allow their motions for judgment as of nonsuit at the close of all the evidence as follows:

At the close of all the evidence the defendants and each of them renewed the motion for judgment as of nonsuit. Motion overruled as to each defendant, and the defendants and each of them except.

Error No. 3 (R. 50)—The defendants and each of them assign as error that portion of the court's charge embraced within the letters (A) to (B), which is as follows:

(A) The State contends that these defendants each has a spouse living in the State of North Carolina. That the male defendant has a wife living, and had at the time of the second marriage or purported marriage contract. That the feme defendant, the female defendant, had at that time a living husband in the State of North Carolina. That no service was had upon either of them that in law was binding upon the persons residing in Caldwell County, North Carolina; that is, Mrs. O. B. Williams, and Mr. Hendrix. That neither of these persons, to-wit, Mrs. Williams and

Mr. Hendrix, personally or by attorney, made any appearance in the courts of Nevada, and, therefore, the entire proceedings in the State of Nevada was void. That they went to the State of Nevada, not to establish a bona fide residence, but solely for the purpose of taking advantage of the laws of that State and obtain a divorce through fraud upon that court. (B)

Error No. 4 (R. 50)—The defendants and each of them assign as error that portion of the court's charge embraced within the letters (C) to (D), which is as follows:

(C) Gentlemen of the jury, the court charges you as a matter of law that service by publication in the State of (fol. 54) Nevada, as indicated by the documentary evidence, does not give to the State of Nevada jurisdiction to grant a divorce to a married person that would authorize and validate a second marriage in the State of North Carolina. (D)

Error No. 5 (R. 51)—The defendants and each of them assign as error that portion of the court's charge embraced within the letters (E) to (F), which is as follows:

(E) I read to you the following syllabus from Book 203, North Carolina Reports, reading verbatim from Syllabus 3, page 533: "Divorce of another State based upon service by publication on residents of this State is not valid here." (F)

Error No. 6 (R. 51)—The defendants and each of them assign as error that portion of the court's charge embraced within the letters (G) to (H), which is as follows:

(G) Where the husband domiciled in another State obtains a decree of absolute divorce from his wife domiciled in this State in which proceeding the wife is served with summons by publication in accordance with the laws of such other State (that is, by putting in the newspaper notifying the defendant and the public that application is being made for divorce), and in which the wife does not

appear in person or by attorney, the decree of divorce based upon such service is not valid in this State. And in the instant case the State of North Carolina alleges and insists that neither the wife of the male defendant here in North Carolina, nor the husband of the female defendant, made a personal appearance in that court, nor did they, the State insists, make any appearance by attorney or have anyone to represent them, or make any appearance otherwise. (H)

Error No. 7 (R. 51)—The defendants and each of them assign as error that (fol. 55) portion of the court's charge embraced within the letters (I) to (J), which is as follows:

(I) I have read this verbatim, Syllabus 3 from *Pridgen* v. *Pridgen*, in 203 North Carolina Reports, which is directly upon the subject. This case was tried by Judge Barnhill, at present an Associate Justice of the Supreme Court of North Carolina, at that time a Superior Court Judge, and incidentally one of the greatest lawyers that this State has ever produced. The opinion is written by Judge Adams, another great lawyer who has since gone to his reward. (J)

Error No. 8 (R. 52)—The defendants and each of them assign as error that portion of the court's charge embraced within the letters (K) to (L), which is as follows:

(K) The defendants offered a card as evidence, and with respect to that card the court charges you, gentlemen of the jury, that the card indicated or agreed to do certain things, but the card itself, in law, does not constitute a personal appearance. If the husband of Mrs. Hendrix had done what the card purports that he would do if the papers were sent to him, that would have constituted a personal appearance, but my promising to make a personal appearance by attorney does not constitute one. It takes more than that. Suppose I want to make an appearance in the State of Nevada. I may authorize it in writing or by

attorney—someone get up and appear for me. The State insists that it was not done in this case and the defendants that it was. It takes more than a promise to make an appearance or accept service or to constitute service. There must be a carrying out of that promise. (L)

Error No. 9 (R. 52)—The defendants and each of them assign as error that portion of charge embraced within the letters (M) to (N), which is as follows:

(fol. 56) (M) The court says as follows: "The decree of divorce based upon such service is not valid in this State, and an attempted second marriage of the wife will be declared void in an action brought by the husband of the second attempted marriage." (N)

Error No. 10 (R. 52)—The defendants and each of them assign as error that portion of the court's charge embraced within the letters (O) to (P), which is as follows:

(O) The State insists under the facts and the law that they have no such right. "That in truth and in fact they are not legally man and wife, and that they have been conducting themselves and living as such, and asks you so to find beyond a reasonable doubt." (P)

Error No. 11 (R. 53)—The defendants and each of them assign as error that portion of the Court's charge embraced within the letters (Q) to (R), which is as follows:

(Q) Before I forget it I want to call your attention to the alleged service by the Sheriff of Caldwell County upon Mrs. Williams. The defendants insist that she was served with process. To make you a party defendant to a lawsuit started and instituted for a divorce in this Court, the Superior Court of Caldwell County, a complaint is filed in the office of the Clerk of the Superior Court, a summons, a document in writing indicating upon its face what it is, is attached thereto, signed by the Clerk of the Superior Court, given to the Sheriff or his deputy or constable, an

officer clothed with the power of serving process. This is taken and served upon the defendant, and until that is done, or the defendant voluntarily comes into court in person or by attorney, the court has no jurisdiction of that defendant, that is here in North Carolina. No man can come into this Court and prepare a complaint and proceed to obtain a (fol. 57) judgment of the court upon it without serving such process upon the defendant, and it properly served as the law provides, because it involves the rights, liberties and privileges of the State citizenship. (R)

Error No. 12 (see R. 53)—The defendants and each of them assign as error that portion of the Court's charge embraced within the letters (S) to (T), which is as follows:

(S) Whereupon the Court charges you as a matter of law that the purported or attempted service of the Sheriff of Caldwell County upon the defendant's wife, Mrs. Williams, of the pleading and papers to this State from the State of Nevada had no effect in law, because the Sheriff had no authority to serve them, and the fact that he did so amounted to nullity, which means nothing. Therefore, she was not brought into the State of Nevada by virtue of the attempted service, and the Court so instructs you. (T)

Error No. 13 (see R. 54)—The defendants and each of them assign as error that portion of the Court's charge embraced within the letters (U) to (V), which is as follows:

(U) Our Supreme Court says, in *State* v. *Herron*, 175 North Carolina, page 754, Syllabus 3: Where a decree of divorce in another State is solely relied on as a defense on a trial for bigamy which is attacked by the State for insufficient residence in such other State, with supporting evidence, the defendant must satisfy the jury of the bona fide

of his residence for the required time, but not beyond a reasonable doubt, and the same would apply as to bigamous cohabitation and assumption of the marital relation between a man and a woman who are themselves married at the time, and if they so associate themselves together under a contract alleged to be a marital contract in some foreign state being relied upon for a divorce, that Court must have had the (fol. 58) requisite jurisdiction to grant the divorce or divorces in question (V).

Error No. 14 (see R. 54)—The defendants and each of them except and assign as error the charge of the Court as whole, for the reason that the charge states the law incorrectly, and for further reason that the Court charged the jury upon matters of law concerning which there was no evidence with respect thereto.

Argument.

It is to be observed that the plaintiffs in error were adjudged to be bona fide citizens of the State of Nevada (see R. 17 and 34). This finding of fact by the Nevada Court of competent jurisdiction was not attempted to be impeached in the trial of this cause. Such finding of fact is conclusive and binding upon the courts of the State of North Carolina and cannot be collaterally attacked. In *Harding* v. *Harding*, 49 L. Ed. 1066, this Court held that a final decree in chancery is as conclusive as a judgment at law and that the courts of one State must allow to a judgment of a sister State the same effect that it has in the State where rendered.

In 34 Corpus Juris, page 1127, Section 1603, the following is stated to be the law:

The judgment of a court of one State, when sued on, pleaded or introduced in evidence in another State, is entitled to receive the same faith, credit, and respect that

is accorded to it in the State where rendered, so that if valid and conclusive there, it is so in all other States. But a judgment from another State is entitled to no greater effect or finality than would be accorded to it in the State where rendered; and hence if it would there be inconclusive, impeachable, or re-examinable, it will receive no greater consideration or measure of finality in other States. The validity and effect of a judgment must therefore be determined by reference to the laws of the State where it was rendered. If a judgment is valid in the State where it is rendered, it will be given full faith and credit in another State, without inquiring whether the domestic courts would or could have rendered such a judgment, whether such a judgment would have been valid under the local laws, or whether the court rendering the judgment was right or wrong in the interpretation and application of the laws of its own State, or even in its reading and application of the laws of the State where the judgment is brought in question. The rule has been held to apply, although the cause of action or statute upon which the judgment is based is against the law and public policy of the State or territory in which enforcement is sought. Also the judgment will be accorded the effect given it in the State of its rendition, although a similar judgment of a home tribunal would not have the same effect. On the other hand, it has been held that a judgment of a sister State will be disregarded if to enforce and recognize such judgment would in effect nullify the obligations imposed by law in the State of the forum between citizens thereof. For the purpose of determining the laws of the State where the judgment was rendered it is held in some of the States that the courts of one State may take judicial notice of the laws of another State; but this doctrine is not generally accepted. On the contrary, it is held that laws of a foreign State must be proved as facts, and if there is no evidence in regard to the laws of

the State where the judgment was rendered, the court where it is sought to be enforced will presume that those laws are the same as the laws of its own State, and will give effect to the judgment accordingly.

In 19 Corpus Juris, page 179, Section 445, where the law deals particularly with the status of persons, it is held:

Except as to the subsequent status of the parties, that is, that they are no longer husband and wife, a decree is conclusive of the matters determined only when it is set up against a party to the divorce suit; but it does not settle the status of their prior relations so as to render them valid as to the whole world regardless of whether or not they were so in fact. In New York a decree of divorce is binding on a corespondent who appears and contests the allegations of adultery, notwithstanding he is afterward placed in default, but otherwise if he has not appeared.

In 34 Corpus Juris, page 1135, Section 1611, it is held:

A judgment rendered in another State by a court having jurisdiction is conclusive not only as to all matters which were actually in issue and decided in that suit, or which were necessarily implied in, or to be inferred from, the judgment, in the sense that the judgment could not have been rendered without the finding or determination of such matters, but also as to other matters which the parties might have litigated and which might have been decided as incident to, or essentially connected with, the subject matter of the litigation within the purview of the original action, either as a matter of claim or of defense. Even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established so long as the judgment in the first suit remains unmodified. But a judgment is not conclusive as to any matters which might have been brought into the litigation, or causes of action which plaintiff might have joined, but

which in fact were neither joined nor embraced by the pleadings.

Thus it will be seen that the trial judge was in error in Assignments of Error 3, 4 and 6 when he charged the jury as a matter of law that the Nevada divorce decrees were null and void and of no effect.

Divorce Action Is An Action In Rem.

The plaintiffs in error contend that it is universal law that an action for divorce is one *in rem* affecting the marital status only and that such action being an action *in rem* substituted service is universally recognized as a legal and proper way to confer jurisdiction of the status upon the court rendering the decree when one of the parties is a bona fide citizen and within the jurisdiction of such court. Divorce actions have been held to be actions *in rem* in the following cases:

Garner vs. *Garner*, 56 Md. 127; *Hood* vs. *Hood*, 110 Mass., 463; *Ferrell* vs. *St. Paul*, 64 N. W., 809 (Minn.); *Gould* vs. *Crow*, 57 Mo. 200; *Page* vs. *Baker*, 76 N. Y., 78; *Ditson* vs. *Ditson*, 4 R. I., 87; *Gildersleeve* vs. *Gildersleeve*, 88 Conn. 689; *Miller* vs. *Miller*, 200 Io. 1193; *Freet* vs. *Holdorf*, 205 Io. 1081; *Kendrick* vs. *Kendrick*, 188 Mass. 550; *Keenan* vs. *Keenan*, 40 Nev. 351; and indeed North Carolina recognizes a divorce action to be an action *in rem* (see Appendix 2), in that said State of North Carolina authorizes by the statute set forth as Appendix 2 the granting of a divorce upon service by publication.

Action for Divorce Being One in Rem Service by Publication Is Valid.

The distinction between an action *in personam* and an action *in rem* is that in the first instance a judgment

rendered operates so as to require the party against whom same is rendered to do some personal act. Obviously in such a case actual and personal service must be had. But in the latter case, that is an action *in rem*, the judgment does not operate against the person of the defendant but serves only to affect the "thing" in litigation. In a divorce action the decree entered affects only the marital status and does not operate as a judgment *in personam*.

In *Pennoyer* v. *Neff*, 95 U. S. 714, it is held that substituted service in an action *in rem* or *quasi in rem* is a valid service if authorized by the laws of the forum. To the same effect is *Gassert* v. *Strong*, 38 Mont. 18, *White* v. *Glover*, 116 N. Y. S. 1059.

Likewise the case of *Millikan* vs. *Meyer*, 85 L. Ed. 278, holds that service by publication in actions *in rem* or quasi *in rem* is valid.

North Carolina Courts Under Article IV, Section I of the Constitution of the United States Are Required to Give Full Faith and Credit to the Nevada Decrees.

Addressing ourselves to Assignments of Error 1, 2, 4 and 6, it is to be observed that under the criminal procedure of North Carolina a motion for judgment as of nonsuit at the close of the state's testimony, which motion is renewed at the close of all of the testimony, raises all the legal questions federal as well as state which may be and were argued upon such motion.

By the overwhelming weight of authorities throughout the United States, it is held that a judgment rendered in one state, pursuant to and in accordance with the laws of that State, shall be recognized and given full faith and credit in every other state in the union when the same has been duly authenticated in accordance with the acts of Congress. In *Faris* v. *Hope*, 298 F. 727, it was held that a

decree of divorce will be given the same effect in any court within the United States as it is given in the jurisdiction where rendered. Then in *Frey* v. *Frey*, 58 F. 2d, 1046, the court held that if a divorce decree was valid in the jurisdiction where the same was rendered then it is valid everywhere. *Davis* v. *Davis*, 83 L. Ed. 26, which is a recent case, held that if the decree of divorce was valid in the jurisdiction rendering it, it must be recognized, upheld and given full force and effect in every other jurisdiction. The decision in *Davis* v. *Davis* affirms the principle laid down in *Loughran* v. *Loughran*, 292 U. S. 216. This principle was first adopted by the United States Supreme Court in the case of *Atherton* v. *Atherton*, 181 U. S. 155. A divorce action being an action affecting only the *res*, that is the marital status, and having been once adjudicated, it becomes *res judicata* and a bar to subsequent suit for the same relief. *Kirby* v. *Kirby*, 55 P. 2d 356; *Voorhies* v. *Voorhies*, 166 So. 121; *Cope* v. *Cope*, 196 A. 422. The foregoing is generally recognized to be the law regardless of the place of the marriage. *Voorhies* v. *Voorhies*, *supra*.

In *Cardinale* vs. *Cardinale*, 68 P. 2d 351, and *Miller* vs. *Miller*, 200 Iowa 1193; *Commonwealth ex rel. Cronhardt* vs. *Cronhardt*, 193 A. 484, it is held that where a decree of divorce is regular on its face it is presumed to be valid in all respects. Following this presumption it is held in the same case and in *Renner* vs. *Renner*, 181 A. 191, that the burden of proof in the face of a divorce decree regular upon its face rests upon the parties attacking such decree.

It is to be observed that in the case at bar no evidence of any kind was offered by the State of North Carolina attacking the divorce decrees in question for any reason or upon any ground.

Title 28, U. S. C. A. section 687 is the Congressional Enactment providing the manner in which judicial proceedings

of another state may be authenticated. The Legislature of North Carolina has adopted that Congressional Enactment and Appendix III, section 687 of the North Carolina Code is as follows:

> "The acts of the legislature of any state or territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such state, territory, or country affixed thereto. The records and judicial proceedings of the courts of any state or territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken."

It is to be observed that there is no law in North Carolina prohibiting citizens in North Carolina from migrating to other states and there establishing bona fide residence and avail themselves of the divorce laws of that State. 19 Corpus Juris, section 836, page 370, we find the following to be stated as a general proposition of law:

> "There is no rule of law, however, which prevents one from changing his domicile in order to facilitate his obtaining a divorce or to secure other advantages he may think that the laws of the new domicile may afford him; he is free to change at his pleasure, providing the change is a bona fide one and a divorce so acquired will be recognized in the State of his former domicile."

There certainly can be no question of fraud in the instant case since one of the parties was served with process by the sheriff of Caldwell County pursuant to a statute duly en-

acted in Nevada providing for such method of service, which statute is set forth as Appendix III.

The Plaintiffs in Error Having Been Adjudged Bona Fide Citizens of the State of Nevada Are Entitled to All Privileges and Immunities Guaranteed by Article IV, Section II of the Constitution of the United States.

The Nevada Court received evidence upon the good faith of the residence of the plaintiffs in error and upon that evidence adjudged that the plaintiffs in error were bona fide residents.

In *Conner* vs. *Elliott*, 15 L. Ed. 497, the court held that the privileges secured by this clause of the Federal Constitution were those privileges belonging to citizenship. It is observed that citizenship in the United States is paramount to citizenship in individual states. Otherwise there could be no solidity of the union. Should it be determined that citizens owe their first allegiance to the various states and a secondary allegiance to the United States then it is conceivable that such an attitude among the people generally would eventually result in a disruption of a union and the establishment of forty-eight or more separate and independent countries, and no question exists which would lead more readily to such a situation than the question of marriage and divorce. It is of the utmost importance that this Court adopt the principle of law that a divorce action is one *in rem*, and that service by publication is valid insofar as it affects the marital relationship of the parties. To like effect is the case of *Cole* vs. *Cunningham*, 33 Fed. 538.

The North Carolina Statute Involved in This Action, To-wit; Appendix I, Herein Is Unconstitutional.

Said statute is unconstitutional in that under the court's construction thereof, it extends the legislative powers of

the State of North Carolina into the State of Nevada and by judicial interpretation attempts to legislate what shall be a legal divorce and a legal marriage in the State of Nevada.

In Amendment XIV of the Constitution of the United States, it is provided among other things as follows: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

It cannot be doubted and is not questioned that the plaintiffs in error were citizens of the United States. It cannot be doubted that their residence in the State of Nevada was bona fide since the Court received evidence upon that question and adjudicated that the plaintiffs in error were bona fide residents and the State of North Carolina offered no evidence challenging that adjudication. If the plaintiffs in error were bona fide residents, which up until now has not been questioned by competent evidence, then the Courts of Nevada had the right to render a binding decree of divorce and likewise the Courts of Nevada had the right to issue marriage license and determine when the plaintiffs in error were legally married in that State.

In the case of *Connolly* v. *Union Sewer Pipe Company*, 46 Lawyers Edition 679, this Court held that the State has undoubtedly the power by appropriate legislation to protect the public health and public safety, if, by their necessary operations, its regulations looking to either of these ends amount to a denial to persons within its jurisdiction of the equal protection of the laws they must be deemed unconstitutional and void.

It is to be observed that the North Carolina statute involved, to-wit, Appendix I, creates a crime unknown to the common law without any regard to the intent of the parties and said statute is therefore unconstitutional. In *Ratcliff* v. *The State of Texas*, 289 S. W. 1072, it is held that a statute creating an offense from an act without respect to

the intention of the parties is unconstitutional and invalid.

The plaintiffs in error further contend that the statute, to-wit, Appendix I, under which they are indicted, does not apply to them for the reason that under the specific terms of said statute, persons lawfully divorced are not within the provision of said statute; that the legality of their divorce obtained in Nevada pursuant to and in accordance with the laws of Nevada, has not been challenged or questioned in any manner by the State of North Carolina other than the arbitrary and peremptory instructions of the trial court to the effect that the Nevada decrees were void as a matter of law. This instruction extends the provisions of the statute and the judicial decrees of North Carolina to the State of Nevada and answers arbitrarily and negatively the legality of Nevada laws and that such extension of legislative power is unconstitutional under and by virtue of the provisions of the Fourteenth Amendment of the Constitution of the United States. The plaintiffs in error contend that this court should so hold.

Social Aspects of the Question Involved.

In Vreeland on "Validity of Foreign Divorce Decrees, 1938" at page 25, it is stated:

> "The question of divorce jurisdiction in the United States seems to be considered one of difficulty and confusion. While the more recent cases as a rule do not go deeply into the theory of the matter, not infrequently one sees articles and hears discussions stressing the complexity of the problem and ending with a statement to the effect that the Supreme Court of the United States should declare whether a divorce suit is *one in personam or in rem.*"

The above quotation poses the question for this Court in the most apt language that the plaintiffs in error have been able to discover.

A decision by this Court sustaining the opinion of the Supreme Court of North Carolina would create havoc among literally thousands of married couples throughout the United States. To sustain this opinion can conceivably result in laws and judicial interpretation of laws in various states so that couples will be legally married in one state and living in adultery in all of the other states to which they might perchance travel.

To sustain this opinion will completely upset property rights and the marital status of thousands of couples throughout the United States.

It is a matter of which the Court should take judicial notice that many people, there being no statutory prohibition, have established residences in states with the more liberal divorce laws and there obtained divorce and later remarriage. Many children have been born to such unions and property rights have become vested by reason of the death of one or both of the parents and to sustain the opinion of the Supreme Court of North Carolina would not only declare illegal these marriages, but would bastardize the children born to said marriages and completely undermine the vested property rights of many American citizens who have been born, reared, and have inherited property from their respective parents under exactly the same situation as presented in the case at bar.

The State of North Carolina argues that it is against the public morals of said State to recognize the validity of a foreign divorce decree and many authorities are cited to that effect. The State of North Carolina, however, fails to recognize that in the cases cited by it, the question involved and litigated therein is a question *in personam* concerning which the foreign court did not attempt and could not litigate without jurisdiction of the right *in personam* by bringing both of the parties within the jurisdiction of the foreign court.

It is probably argued that the foreign court rendering the divorce decree could not acquire jurisdiction of the marital relationship unless both parties subjected themselves to the jurisdiction of the court rendering the decree. This reasoning is fallacious in that the marital relationship is a status and that status accompanies each individual wherever that individual may establish a residence and it is not necessary therefore to have both parties within the jurisdiction of the court in order to adjudicate that status.

The anomaly of the situation is this. Suppose that two people from New York, Maryland, Virginia or any other State, had procured divorces in the State of Nevada, Arkansas, Virginia, or any other State in the Union, and had intermarried with each other and were traveling through North Carolina and perchance stopped at a hotel. Under the decision of the North Carolina Supreme Court such people might be indicted for bigamous cohabitation and sentenced to serve a term in the State's Prison of North Carolina. Likewise persons who have been divorced and married under similar circumstances outside the State of North Carolina might perchance decide to establish permanent residence in North Carolina, and upon the establishment of such residence under North Carolina interpretation of the statute set forth in Appendix I, such persons could be indicted and convicted of bigamous cohabitation.

One of the questions, therefore, that this Court should consider most carefully with respect to public morals is whether or not it should declare illegal many thousands of marriages and bastardize many thousands of children when the children born of previous marriages cannot be affected by the decision of the Court since they were born in lawful wedlock. WHY DESTROY THE LEGITIMACY AND PROPERTY RIGHTS OF CHILDREN BORN TO THE SECOND UNION WHEN SUCH DESTRUCTION WILL IN NO WISE ENHANCE THE RIGHTS OR

PRIVILEGES OF CHILDREN BORN TO THE FIRST MARRIAGE?.

Is it not better to recognize the validity of the foreign divorce decree and the foreign marriage, and therefore, maintain the integrity and union of thousands of homes as well as extend legitimacy and property rights of children born to the second marriage?

It is, therefore, respectfully submitted by the plaintiffs in error that this honorable Court should decree that a divorce action is one *in rem;* that such action being one *in rem,* service by publication is valid and effective insofar as it affects the marital status and that the Nevada decrees involved in this controversy should be recognized by the State of North Carolina under the full faith and credit clause and other pertinent provisions of the Constitution of the United States cited herein, and that the opinion rendered by the Supreme Court of North Carolina as appears in the record on page 55 should be reversed; that these plaintiffs in error should be set at liberty.

Respectfully submitted,

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Washington, D. C.

APPENDIX I.

Section 4342 of the North Carolina Code: If any person, being married shall marry any other person during the life of the former husband or wife, every such offender, and every person counseling, aiding or abetting such offender, shall be guilty of a felony, and shall be imprisoned in the state's prison or county jail for any term not less than four months nor more than ten years. Any such offense may be dealt with, tried, determined and punished in the county where the offender shall be apprehended, or be in custody, as if the offense had been actually committed in that county. If any person, being married, shall contract a marriage with any other person outside of this state, which marriage would be punishable as bigamous if contracted within this state, and shall thereafter cohabit with such person in this state, he shall be guilty of a felony and shall be punished as in cases of bigamy. Nothing contained in this section shall extend to any person marrying a second time, whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to have been living within that time; *nor to any person who at the time of such second marriage shall have been lawfully divorced from the bond of the first marriage;* nor to any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction.

APPENDIX II.

Section 484 of the North Carolina Code: Where the person on whom the service of the summons is to be made cannot, after due diligence, be found in the state, and that fact appears by affidavit to the satisfaction of the court, or a judge thereof and it in like manner appears that a cause of action exists against the defendant in respect to whom service is to be made, or that he is a proper party to an action relating to real property in this state, such court or judge may grant an order that the service be

made by publication of a notice in either of the following cases:

5—Where the action is for divorce.

APPENDIX III.

NEVADA LAW. SECTION 8582 SERVICE OF PROCESS OUTSIDE OF NEVADA WHEN BY PUBLICATION.

Section 84: When the person on whom service is to be made resides out of the state, or has departed from the state, or cannot, after due diligence, be found within the state, or conceals himself to avoid the service of summons, and the fact shall appear, by affidavit, to the satisfaction of the court or judge thereof, and it shall appear, either by affidavit or by a verified complaint on file, that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action, such court or judge may grant an order that the service be made by the publication of the summons.

Provided, that when said affidavit is based on the fact that the party on whom service is to be made resides out of the state, it shall be a sufficient showing of such fact if the affiant shall state generally in such affidavit that at a previous time such person resided out of this state in a certain place (naming the place and stating the latest date known to affiant when such party so resided there); that such place is the last place in which such party resided to the knowledge of affiant; that such party no longer resides at such place; that affiant does not know the present place of residence of such party or where such party can be found; and that affiant does not know and has never been informed and has no reason to believe that such party now resides in this state; and, in such case, it shall be presumed that such party still resides and remains out of the state, and it shall not be necessary to use due or any diligence to find such party in this State, or to show by affidavit that

due or any diligence was so used. As Amended, Stats. 1923, 275.

Section 2. Section 85 of an act entitled "An act to regulate proceedings in civil cases in this State, and to repeal all other acts in relation thereto," approved March 17, 1911, is hereby amended so as to read as follows:

"Section 85: The order shall direct the publication to be thereof, for a period of four weeks, and at least once a week during said time. In case of publication, where the residence of a nonresident or absent defendant is known, the court or judge shall also direct a copy of the summons and complaint to be deposited in the post office directed to the person to be served at his place of residence. When publication is ordered, personal service of a copy of the summons and complaint, out of the state, shall be equivalent to completed service by publication and deposit in the post office, and the person so served shall have thirty days after said service to appear and answer or demur. The service of the summons shall be deemed complete in cases of publication at the expiration of four weeks from the first publication, and in cases when a deposit of a copy of the summons and complaint in the post office is also required, at the expiration of four weeks from such deposit. As Amended Stats. 1931, 159.